

CMI NEWS LETTER

Vigilandum est semper; multae insidiae sunt bonis.

COMITE MARITIME INTERNATIONAL

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NEWS FROM THE CMI

MINUTES OF THE EXECUTIVE COUNCIL MEETING HELD IN NEW YORK AT THE OFFICES OF CURTIS, MALLET-PREVOST, COLT & MOSLE LLP, 101 PARK AVENUE ON APRIL 30 AND MAY 1, 2008

Participating:

<i>President:</i>	Jean-Serge ROHART
<i>Past President:</i>	Patrick GRIGGS
<i>Vice-Presidents:</i>	Karl-Johan GOMBRII Stuart HETHERINGTON
<i>Councillors:</i>	José Maria ALCANTARA Christopher DAVIS Johanne GAUTHIER José Tomás GUZMAN Mans JACOBSSON Gregory TIMAGENIS
<i>Secretary-General:</i>	Nigel FRAWLEY
<i>Administrator:</i>	Wim FRANSEN
<i>Treasurer:</i>	Benoit GOEMANS

The President opened the meeting by referring to agenda item number 6 – Report of Steering Committee on CMI Reforms – and stating that this would be one of the opening items when the meeting resumed on May 1, 2008. He then said that the decisions on the recommendations in that report would be implemented by his successor, not him, following the Athens Conference.

The President then turned to the agenda.

1. Minutes

(a) The minutes of the Executive Council meeting conducted by e-mail during the week of November 19, 2007 were then discussed. Nigel Frawley moved for their approval, which was seconded by Chris Davis and approved unanimously. The President recommended that the annual Executive Council meetings conducted by e-mail be continued following the completion of his term as President at the end of the Conference in Athens.

(b) There was no business arising from the minutes.

2. Finances

(a) The report of the Treasurer was reviewed. There was considerable discussion about investing the funds and the consensus was that we must not be too risky nowadays. The decision was that the funds be invested in fixed interest instruments only, e.g., high quality government bonds and that there be no investment in real estate certificates. The President directed the Treasurer to consult with the Audit Committee under its new chairperson, Liz Burrell, and report well before the next Assembly.

There was then discussion about the 5% reduction in subscriptions across the board and the 5% discount for “early bird” payments for the fiscal year 2007, i.e. discussion about whether these benefits should be renewed for 2008 following which the President moved, seconded by Johanne Gauthier, that the 5% reduction across the board be discontinued.

This was approved, with Mr. Alcantara opposing. As to the early bird discount, a consensus was reached that this would be continued for the 2008 year subject to retroactive approval by the Assembly at Athens when a motion should also be made to cover this for future subscriptions.

The President then extended his congratulations to Mr. Goemans for an excellent report.

(b) Mr. Gombrii reported that in general there had been an improvement in unpaid contributions.

3. Member issues

The President reported on the position of certain Associations.

4. CMI Charitable Trust

Mr. Griggs reported that the fund’s investments had gone down in value owing to the declining stock market. The overall value stood at £ 390,000 sterling as of March 28, 2008.

5. Conferences etc.

(a) The Secretary-General then reported on the Dubrovnik Symposium, 2007, and said that although the financial results were disappointing, the Symposium was a great success and that many compliments had been received about the event. There was some discussion about assistance in the form of a contribution from the CMI. Mr. Griggs said that he would speak to the President of the Croatian MLA about the situation and report back to the President.

(b) The Secretary-General reported that the substantive program for the Athens Conference was finalized and speakers were preparing papers for publication in CMI Yearbook – Athens I. Mr. Timagenis reported that all other arrangements were going well and that 109 delegates had registered and although the breakeven point (i.e. another 100 registrants) had not yet been reached, there was every expectation that this would be achieved in the near future. He also said that Lloyd’s List and Trade Winds will advertise the Conference and may attend to report on it. Mr. Timagenis undertook to look into whether speakers’ registration fees would be treated as “early bird” registrants for the purposes of a final accounting with the CMI. The President then thanked the Secretary-General and the organizing committee for a job well done.

(c) The President read a letter that had been received from the President of the MLA of Chile dated April 29, 2008 which proposed a colloquium in Vina del Mar from October 4-7, 2010, with registration and an opening ceremony on October 3rd. He proposed two subjects – transport law (UNCITRAL Convention on Carriage of Goods)

and the protection of the marine environment. The MLA is in the process of securing professional conference organizers and they anticipate 250 delegates would attend. The President of the MLA of Chile then suggested that they were reluctant to take on the entire financial risk in addition to sharing the profit with the CMI on a 50/50 basis as set forth in the CMI guidelines on the subject. Following discussion, the President took the matter under advisement and said that, in any event, the MLA of Chile would have to pay their outstanding subscriptions first before they are given approval to host the proposed colloquium. Concern was expressed on having the UNCITRAL Convention as a topic as it is on the agenda for the Athens Conference and if a Symposium is held in 2009, it will be on the agenda for that as well. It was suggested that it was unlikely that many lawyers from outside Latin America would travel to Chile to discuss this subject again.

(d) The Secretary-General advised that the Chinese MLA had formerly offered to host the next conference following Athens. The proposed dates are October 15-19, 2012. The proposed venue is Beijing. They have agreed that the CMI Guidelines for Conferences will form the basis of their relationship with the CMI. Mr. Frawley then invited discussion on the proposed dates and venue. During the ensuing discussion, it was pointed out that the proposed dates may clash with the dates of the IOPC Funds meetings or the IMO Legal Committee meeting in London and that the first week in October might be better or, indeed, some dates during the month of May.

(e) The Secretary-General referred to the possibility of a symposium in 2009 and said that if the Signing Ceremony of the UNCITRAL Convention on the Carriage of Goods takes place in Rotterdam in the first half of September 2009, as is expected, the MLA of the Netherlands was proposing that the CMI hold a symposium, complete with a meeting of the Executive Council and Assembly immediately prior to the Signing Ceremony. He said further that he had recently received an e-mail to this effect from Gertjan van der Ziel. Following discussion, the Secretary-General was directed to reply that the Executive Council is grateful for the invitation, that we are interested, more details would be appreciated and that we await developments on whether or not the Signing Ceremony would take place as planned by UNCITRAL

6. *Report of Steering Committee on CMI Reforms*

The President again said that this would be deferred to the agenda items to be discussed the following morning.

7. *Constitution – Revisions*

Mr. Fransen and Mr. Goemans said that they had nothing to report.

8. *Publications*

(a) In the absence of Francesco Berlingieri, his e-mail report of April 9, 2008 was tabled in which he referred to his e-mail of July 4, 2007 on the printing costs of the Yearbook and Newsletter and on the possible direct distribution of both to the subscribers. His idea that a questionnaire be sent to all NMLAs in order to find out whether they wish to subscribe copies and, if so, how many, was discussed but no decision was made and the matter was deferred for further discussion before the next Executive Council meeting in Athens.

(b) Mr. Fransen reported that there were 411 boxes of stored CMI books and other publications and that his suggestion was to put all of the contents onto a CD ROM, for less than 5,000 euros, and to maintain one complete set of hard copies in Antwerp only. The CMI could then sell the CD ROMs to the NMLAs and other interested parties. Following discussion, the decision was made to authorize Mr. Fransen to go ahead with this project so long as it does not exceed 5,000 euros. He should also investigate a selling price for a CD ROM containing such information. It was then suggested to Mr. Fransen that he send a mailing to all NMLAs on whether or not they wish hard copies or would be satisfied with a CD ROM, and then consider whether a substantial number of the 411 boxes in storage should be destroyed thereby saving on storage costs.

(c) There was no report on sales of *Travaux Préparatoires*.

9. *Work in progress*

(a) There was no report on the UNCITRAL Draft Instrument on Carriage of Goods .

(b) There was no report on Issues of Marine Insurance.

(c) Mr. Jacobsson reported on developments relating to the HNS Convention. Without going into too much detail, he referred to the three matters which appear to have impeded ratification of the Convention and that a focus group had been established by the IOPC 1992 Fund to prepare a Protocol dealing with these particular matters. The Group met in Monaco and have made good progress. A draft Protocol will be considered by the IMO Legal Committee in October 2008, at which time the convening of a Diplomatic Conference will likely be considered. There is apparently a fair likelihood that this will go forward. The only unfortunate matter is that the limits of liability in the HNS Convention are now getting out of date. He said that after the June 2008 meeting of the IOPC Funds, more would be known.

(d) There was no report on Implementation and Interpretation of International Conventions.

(e) Mr. Timagenis reported on the draft guidelines for Procedural Rules Relating to Limitation of Liability in Maritime Law that he and his international subcommittee had prepared. He said that the US MLA would not participate because they had not ratified any of the conventions being studied. He said that the guidelines would be debated and voted upon at the Athens Conference. Mr. Alcantara said that he was not comfortable with some aspects of the draft guidelines and that he would put his thoughts in writing to Mr. Timagenis and the President.

(f) Mr. Hetherington reported on the Draft Instrument on Places of Refuge that he and his committee had prepared. He said that meetings had been held in May and December 2007 and that the Draft Instrument would be debated and voted upon in Athens.

(g) Mr. Frawley reported on Fair Treatment of Seafarers and said that he had received nothing from NMLAs on whether the IMO Guidelines had been considered by any courts. He then referred to an article in Lloyd's List of February 28, 2008 which stated that the amendment of SOLAS to make it mandatory for a flag state to investigate a casualty could be delayed by US insistence that the requirement that a seafarer be informed and allowed access to legal advice, regarding the risk of self-incrimination, be removed from the text. The new code, due to be adopted in May 2008, and comes into force in 2009, aims to improve casualty

reporting processes and increase the flow of information to IMO that can be used as the basis for training and future casualty prevention.

(h) Mr. Frawley reported on progress of the convention on the recycling of ships. The panel on this subject, which he will chair, is ready in all respects for the Athens Conference.

(i) Mr. Gombrii reported on promotion of quality shipping and how the IOPC Funds appear to have lost interest in the topic. The question now for the CMI is how to deal with the Replies from NMLAs to the questionnaire, whether to keep this on the CMI work agenda, and how to deal with the subject at the Athens Conference. It was decided that the CMI would not pay for any research on the Replies unless we are to receive reimbursement by the IOPC Funds and that we will keep our options open in this respect after the Athens Conference where there will be a Panel on the subject led by Nigel Carden and Karl Gombrii. In preparation for that, Nigel Carden will review the Replies and a report to all NMLAs might be prepared on that basis after the Conference.

(j) In Henry Li's absence from the meeting there was no formal report from him on judicial sales of ships other than he will not be ready to prepare his paper for another three months owing to the pressure of work. Mr. Goemans said that he would assist Mr. Li in preparation of the paper, on how the topic should be introduced and dealt with in the future with a possible Working Group.

10. Young Member issues and Essay competition

Mr. Alcantara reported on the papers received and the fact that the jury would choose a winner by July 15, 2008. The format of the presentation of the prize was discussed but will need to be finalized once the winner is identified in July.

Mr. Alcantara also said that steps had been taken to promote CLE certification for the CMI Conference. He said that he had sent a letter to the Presidents of NMLAs and that interest had been expressed at this stage by Belgium, The Netherlands and the USA.

He then said that a group of young lawyers had taken the initiative to organize two events during the Athens Conference: i) a breakfast meeting on the Tuesday morning, ii) a restaurant outing on the Thursday evening for the under 35-year-old registered participants as well as any other interested parties who might wish to join them.

11. *International Organizations*

(a) There will be no meeting of the IMO in May 2008 because of the renovations to their building in London. The President and Richard Shaw represented the CMI at the IOPC meeting in Monaco in March 2008.

(b) It was agreed to continue close cooperation with IMLI where several members of the CMI and executive councillors give lectures. The same is true for the WMU – Mr. Jacobsson and Mr. Griggs gave lectures at IMLI in March 2008 and Mr. Goemans has lectured at WMU and attended some of their meetings.

The President reported that IVR had written him to suggest a closer formal cooperation. No decision was taken on the point.

The President also reported that he had received a letter from Dieter Schwampe suggesting a closer relationship between the CMI and the IUMI. It was pointed out that the IUMI was already a consultative member of the CMI.

12. *Next Meeting of Executive Council*

The Executive Council will meet at the Astir Palace Hotel, Athens, on Sunday, October 12, 2008 from 10:00 a.m. to 4:00 p.m. and on Friday, October 17 from 5:30 to 6:30 p.m. after the Assembly.

13. *Next Assembly*

The next Assembly will take place at the Astir Palace Hotel on Friday, October 17 from 2:30 to 5:30 p.m.

14. *Other business*

(a) This was the first matter dealt with at 9:30 a.m. on Thursday, May 1, 2008.

(b) On the subject of Charterers Right to Limitation, Mr. Griggs reported that the UK has not yet replied to the questionnaire and that this was necessary before he could commence writing his paper for the Athens Conference.

(c) The Secretary-General moved that Stuart Beare be granted the title of Honoris Causa at the Athens Conference. Mr. Griggs seconded the motion and it carried unanimously. It was also decided that he be given a gift at the same time.

(d) The President spoke briefly to the joint CMI/ICC revision of the arbitration rules for the IMAO and said that this was a slow ongoing process.

(e) Mr. Gombrii reported on possible applications by new proposed MLAs.

(f) Mr. Davis then referred to the IMO with respect to its future work programme and the subject of protection of the marine environment. He said that Alfred Popp had spoken at the Panama meeting of the IMO Legal Committee and emphasized the importance of this topic. It was generally considered that the CMI should get involved in this. Patrick Griggs said that he would enquire about this with Rosalie Balkin and report back to the Executive Council.

(g) Mr. Alcantara then said that he believed that maritime law developments should be agenda items on a regular basis. However, the President said that the Executive Council should not get mired in the detail of recent decisions. However, a sensitivity to what is going on in the international scene is obviously necessary.

(h) Mr. Gombrii then spoke about an application by a former member association.

(i) At this point, Mr. Guzman referred to Agenda item 2 b) above and said that the Spanish-speaking group had met and decided that it would be useful for a CMI delegation of 1-3 Councillors to participate in the meeting of the Instituto-Iberico-Americano de Derecho Maritimo in Montevideo in November, 2008. The plan would be to review the list of registrants beforehand and discuss their course of action before the meeting. This was regarded as an excellent plan and agreed by the Executive Council.

(j) The President then turned to agenda item number 6 – Report of Steering Committee on CMI Reforms.

Mr. Hetherington led the discussion on the report as follows:

(i) *Annual Subscriptions*

It was decided that the method of computing annual subscriptions for each MLA should not be changed. It was also decided that the Chinese, Japanese, South African, and Australian and New Zealand MLAs should be written explaining the reason for the proposed increase in their annual subscription. It was agreed that the subscription for the South Korean MLA should also be increased.

There was considerable discussion about other countries and their annual subscriptions, the result being that the Steering Committee will continue its work until the Assembly at Athens. Any and all suggestions from members of the Executive Council should be sent to the President and to the Steering Committee.

(ii) Titulary Member Fees and Qualification

There was considerable discussion about this. Although there was general agreement about the recommended criteria for qualification, the President said that he was concerned about abolishing the titulary member fee altogether, as was recommended, and suggested there be, in its place, a one-time application fee. He asked the Steering Committee to consider this.

(iii) Website Assistance

Mr. Griggs said that he would contact Mr. Berlingieri and ascertain his suggestions about a slow takeover of the website by a professional IT person. It was agreed that we should continue putting ratifications of international conventions on the CMI website. Mr. Griggs said that he would ask Rosalie Balkin about the CMI receiving early notice of new ratifications. A decision was made to update the CMI website with ratifications twice per year.

(iv) The Executive Council agreed with the Steering Committee's recommendation that no individual memberships of the CMI be permitted.

(v) It was agreed to encourage Regional Associations where circumstances warrant it, e.g., PIMLA.

(vi) It was agreed that the CMI should support WMU and IMLI but otherwise leave national associations to deal with their own universities.

(vii) The Executive Council considered the recommendations with respect to closer contact with NMLAs. Members were encouraged to make any suggested changes in writing to the Steering Committee.

(viii) No decision was taken on recommendations of the Steering Committee on publications. It was suggested that the Steering Committee should prepare a draft list for circulation so that each member association could indicate how many hard copies of publications they want.

With respect to the recommendation of the Steering Committee that the terms of all officers and Executive Councillors be reduced from four years to three years, there was general agreement. An amendment to the Constitution would have to be made for this and Mr. Goemans indicated that this would not likely pose a problem with the Belgian authorities.

(ix) Young Lawyers

The Executive Council generally agreed with the comments made by the Steering Committee and noted with approval the initiative taken by young lawyers for meetings at the Athens Conference.

(x) The Executive Council generally agreed with the recommendations of the Steering Committee with respect to the appointment of a communications and public relations officer.

It was then agreed that the Steering Committee should do a further report to the Executive Council having received written proposals from executive councillors in the meantime, before the Athens Conference so that it can be included with the mailing of the Assembly Agenda to all NMLA's.

15. Conclusion

Mr. Rohart announced that he would be stepping down from the Presidency at the Assembly in Athens.

16. Termination

The President terminated the meeting at 11:40 a.m. on May 1, 2008.

THE CONTRIBUTION OF CMI TO THE NAIROBI WRECK REMOVAL CONVENTION 2007

The new Wreck Removal Convention 2007 was adopted by a Diplomatic Conference at Nairobi on 14-18 May 2007. It will enter into force when 10 states have ratified it. The adoption of this text was the culmination of over 12 years of preparatory work in the Legal Committee of the International

Maritime Organization (IMO), in which the CMI played a significant part.

The benefits, particularly to developing countries, of a coherent international regime with significant financial advantages are considerable. A wreck is, by definition, a thing of no commercial value. Were

it to have such a value, the salvage industry would no doubt undertake its removal and sale in return for a suitable salvage reward. However a valueless wreck will not yield proceeds of sale equal to the costs involved in its removal. Since most ships are owned by a one-ship company, if the P and I Club concerned does not voluntarily arrange the removal, or reimburse the costs incurred by a coastal state in arranging the removal, the chances of recovering those costs by legal action are very poor. The financial provisions in the Nairobi Convention are therefore of significant benefit to such states.

Following the loss of the tanker “*Torrey Canyon*” off south west England in 1967 the 1969 Intervention Convention was adopted. This convention was designed to meet the need for intervening action by a coastal state arising from a casualty outside the territorial sea of the state but which threatened damage to the coastline of that state. Such a measure was not without controversy. At that time the overriding policy of states such as the UK was to preserve the freedom of navigation on the High Seas by their substantial fleet of merchant ships. Attempts to extend the limits of the territorial sea were resisted.

The rights conferred on states parties to the Intervention Convention are therefore very limited. Article I gave the right to take such intervention measures only where the danger of pollution of their coastline was “grave and imminent”, followed upon a “marine casualty” and was “expected to result in major harmful consequences”. Article V required the measures taken to be “proportionate to the damage actual or threatened” and not to “go beyond what is reasonably necessary to achieve the end mentioned in Article I.”

Following the adoption of the concept of the Exclusive Economic Zone (“EEZ”) in articles 56 to 75 of the 1982 UN Convention on the Law of the Sea, limited rights in that Zone were conferred by Article 56 on coastal states, including rights to take measures for the protection of the marine environment. However, it was not immediately clear that such measures taken for the safety of navigation, such as the removal of a wreck obstructing an important seaway, would fall within this Article.

Just such a problem arose in 1984, when the French vessel “*Mont Louis*” sank off Zeebrugge following a collision. The wreck lay just outside Belgian territorial waters as they existed at that

time, and although a Wreck Removal Order was issued by the Belgian Authorities to the owners of the “*Mont Louis*”, it was not clear that they had jurisdiction to do so. The matter was resolved amicably, but this casualty revealed the absence of a legal right of a coastal state to institute outside its territorial limits legal measures to protect access to a major port

A draft convention on Wreck Removal was first raised in its current form at the IMO Legal Committee’s 69th meeting in the autumn of 1993. At the 70th Session in the spring of 1994 Germany, the Netherlands and the United Kingdom submitted a further paper on this topic. This argued that an international treaty on wreck removal was necessary in order to establish uniform rules for wreck removal operations in *international waters*. The co-sponsors suggested that this would be consistent with the powers of coastal states under Article 221 of UNCLOS and would fill gaps in the existing international law. Attached to this joint submission was a first draft of a wreck removal convention. The 2007 Nairobi Convention has been developed from that draft.

The key components of this draft text were:

1. the grant of rights to the coastal state to remove a wreck from its EEZ if it was a danger to safe navigation or to the marine environment;
2. strict liability on the shipowner for the costs of reporting, marking and removing a wreck if required to do so by the coastal state;
3. compulsory insurance and direct action against insurers, up to the LLMC ¹ Limit, modelled on the equivalent provisions of article VII of the 1969 CLC Convention, itself a CMI supported initiative.

The CMI became actively involved in 1996, three years after the topic entered the Legal Committee work programme. A small International Working Group was set up under the chairmanship of Bent Nielsen (Denmark) to study the proposed Wreck Removal Convention. A questionnaire was prepared and circulated to CMI member national maritime law associations. Based on responses to the questionnaire the CMI International Working Group submitted a report to the 74th Session of the Legal Committee in October 1996. This report commented on the draft convention in the light of its survey of national wreck removal laws in the responses to the questionnaire. Significantly, the report concluded that “the national regimes for wreck removal *within territorial waters*² may have so many similarities that it would be possible to

1. 1976 International Convention on Limitation of Liability for Marine Claims; the revision of this convention which led to the Protocol of 1996, was already well advanced.

2. Emphasis added.

include these areas within the scope of the Wreck Removal Convention". This was the first suggestion of extending the draft convention's provisions to internal and territorial waters, since the IMO draft only related to international waters. The CMI report commented:

"Since the majority of wreck removal cases will relate to wrecks within the territorial sea, it would be important to maintain widespread international unification of the rules governing such wrecks...the unification would be much more complete, if the WRC by itself was applicable also to national waters, but permitted a state party to exempt such waters from its application."

These prescient remarks led to a major debate during the development of the Wreck Removal Convention by the IMO Legal Committee.

The evolution of the Wreck Removal Convention

The Netherlands was appointed "lead country" by the governments working on the draft of this convention. That nation's predominant position in the world of salvage, with which wreck removal is inevitably linked, made this a logical choice. However at the meetings of the IMO Legal Committee the Netherlands delegates maintained a steadfast reluctance to extend the provisions of the draft to inland or territorial waters.

There was a rational basis for their position. The limits on the rights of coastal states to take measures in the EEZ outside their usual jurisdiction resulted in the appearance in the draft text of carefully worded clauses limiting the freedom of action of the intervening state. These can be seen in Articles 2 and 9 of the final text, and reflect the limitations imposed by the 1969 Intervention Convention. Such limitations were not necessarily appropriate to action taken by a state in its internal waters and the territorial sea, and certain delegations fiercely defended their governments' right to take any action which they considered appropriate in such waters.

However the indisputable fact that most troublesome wrecks lie in shallow waters, and that most such wrecks are therefore in internal waters and the territorial sea, led the Diplomatic Conference to adopt finally a text which gave states parties the option to extend the convention's provisions to such waters. This was, however, only

achieved in the final stages of the discussions. At the meeting of the Legal Committee in April 2005 a provision to this effect was actually *removed* from the draft text.

The urgent need to adopt amendments to the 1988 Convention on the Suppression of Unlawful Acts against the Safety of Marine Navigation in the wake of the events of 9/11, and pressure to adopt amendments to the 1974 Athens Convention on Liability to Passengers, delayed the adoption of a final text of the Wreck Removal Convention for several years.

During the summer of 2006 a small CMI Working Group reviewed the text generally and proposed a number of drafting amendments. In addition it reminded the IMO of the importance of resolving the debate over the "opt in" provisions. An extensive debate took place at the Legal Committee meeting in Paris in October 2006, but the opt-in issue remained unresolved. Impetus was given by the International Group of P and I Clubs, whose members had agreed to give the letters of financial security for wreck removal expenses as required by the draft convention. The International Group representatives emphasised that their member associations would not give a guarantee for expenses incurred by a coastal state which fell outside the carefully crafted wordings of articles 2,5,6,7,8 and 9, whereas the delegates of some states had asserted that they could not accept such limitations on their freedom of action within their own territory.

As the October meeting concluded, it appeared that the prospects for a successful diplomatic conference in the following May were looking distinctly doubtful.³ A small focus group chaired by Germany was tasked with finding a solution to this issue, and an important meeting took place in London in March 2007 at which the focus group reported and significant progress was made. The CMI took an active part in that meeting. This meeting led directly to the successful resolution of this issue at Nairobi, by the inclusion of an "opt-in" provision in Article 3 of the Convention, while retaining provisions which recognised the rights of a coastal state to take any appropriate action inside its internal and territorial waters while limiting the financial exposure of the guarantee provided by shipowners and their P and I Clubs to the reasonable measures in accordance with Articles 2, 5,6,7, 8 and 9.⁴

The Nairobi Wreck Removal Convention will be discussed at one of the sessions of the CMI

3. See the articles by the author in 2006 CMI News Letter at www.comitemaritime.org/news/pdffiles/2006-2.pdf

4. See articles 3 and 4 of the final text.

Conference in Athens in October 2008. It is hoped that Mr Jan de Boer of the Netherlands, who was Chairman of the Committee of the Whole of the Nairobi Diplomatic Conference, will participate in this discussion. The careful balancing of the rights of the flag state

with those of the affected coastal state was the continuing theme of the debates leading to the adoption of the text of this convention. The speed and number of ratifications will be the ultimate test of whether that balance was successfully achieved.

RICHARD SHAW⁵

NEWS FROM INTERGOVERNMENTAL AND INTERNATIONAL ORGANIZATIONS

NEWS FROM THE IOPC FUNDS

IOPC FUNDS MEETINGS IN MONACO, 11-13 MARCH 2008 AND IN LONDON 23-27 JUNE 2008

I

The Spring meetings of the Organs of the IOPC Fund were held in Monaco since the refurbishment of the IMO Building was not then complete. The 1992 Fund Executive Committee discussed several major claims, and two separate Working Groups debated Measures to Facilitate the Entry into Force of the HNS Convention and Non-Technical Measures to Promote Quality Shipping.

Claims

Erika

The publication in January 2008 of the judgment of the Paris Criminal Court in the case of the criminal prosecution of a number of parties involved in this casualty was greeted with keen interest, particularly since the Paris Court has condemned four parties including RINA, the ship's classification society and Total SA, the parent company of the ship's charterer Total Transport Corporation, to pay a total of 192 million Euros as damages, notwithstanding the apparent conflict with Article III.4 of the CLC Convention. Me Jean-Serge Rohart, President of CMI and French legal advisor to the IOPC Fund, gave a succinct summary of the judgment, but wisely refrained from commenting on the defendants' forthcoming appeal. His summary can be read in document 92FUND/EXC.40/4 on the IOPC Fund website at www.iopcf.org

Volgoneft 139

Another interesting case was that of the tanker

Volgoneft 139 (3463 tons gross) which broke in two on 11th November 2007 in a storm while anchored in the Strait of Kerch between the Sea of Azov and the Black Sea, laden with a cargo of fuel oil. Between 1200 and 2000 tonnes of oil were spilt causing pollution of the shores of Ukraine and Russia on either side of the strait. Russia is a member of the IOPC Fund but Ukraine is not. Claims have been brought in the Arbitration Court of St Petersburg for 73.5 million Roubles (about £1.5 million) against the owner of the *Volgoneft 139*, their insurer and the 1992 Fund.

Assistance was offered by the Fund Secretariat to the Russian Embassy in London on receipt of news of this casualty, and this offer was repeated at a meeting with the Russian Minister of Transport and his Vice Minister while they were attending the IMO Council meeting in London. At the date of the Monaco meeting no formal response had been received, but the delegate of the Russian Federation presented a short film to the meeting. The Director was happy to accept the invitation of the Russian Federation to meet in Moscow to discuss the facts of this casualty, and to send surveyors to the scene. It is regrettable that the IOPC Fund was not invited to take an active part at an earlier date, since it may now be too late to mitigate much of the pollution damage. A delegation from Ukraine, which is not a member of the IOPC Fund, was granted observer status at the meeting, and watched the debates with keen interest.

Hebei Spirit

The collision on 7th December 2007 between the

5. For a more detailed analysis of the history and principal clauses of the Nairobi Convention see the article by the author in *Il Diritto Marittimo* 2007 at page 343.

large floating crane “*Samsung No 1*” and the Hong Kong flag tanker *Hebei Spirit*, at anchor off the south east coast of Korea, has proved to be the worst pollution incident in Korean history. Approximately 375 kilometres of the Korean coast, including areas noted for mariculture and recreation, have been badly oiled. Claims estimated to total between £190m and £229m are expected. The total available from the CLC and IOPC Funds is only £164m, since Korea is not a member of the Supplementary Fund.

At this early stage and with a casualty of such importance, it is always extremely difficult to make a realistic estimate of the likely total pollution claims, and thus to fix a fair level at which settlement payments can be made. Too low a level of payments would make the Fund seem ungenerous to needy claimants, while too high a level could result in overpayment, which would leave late claimants unpaid. After a good debate, the meeting decided to authorise payment of 60% of claims which have been assessed and agreed. At this stage the Government of Korea has not agreed to “stand last in the queue” as the British and French Governments have done in the “*Braer*” and “*Erika*” cases. This is now under consideration.

Working Groups

Measures to Facilitate the Entry onto Force of the HNS Convention 1996

A “focus group” has been set up under the chairmanship of Alfred Popp QC (Canada) to look into the issues inhibiting ratification of the HNS Convention. The three principal areas of concern are i. Contributions from packaged cargo; ii. Contributories to the LNG Fund; and iii. Non-reporting of contributing tonnage of HNS.

It has become clear that the terms of the HNS Convention create significant problems for states contemplating ratification, and a draft protocol to the 1996 Convention, addressing these problems, which has been developed by a correspondence group since the last meetings, has received widespread support. The text of the proposed protocol, which must be approved by the IMO Legal Committee and Assembly before being submitted to a short diplomatic conference, is to be found at www.iopcf.org entitled 92FUND/WGR.5/6

Non-Technical Measures to Promote Quality Shipping

The principal thrust of this work concerned the

possibility of removing legal obstacles to the sharing between marine underwriters of information relating to sub-standard ships. The CMI has circulated a questionnaire on this topic to its member National Maritime Law Associations, and a short paper setting out the situation at the end of February 2008 was presented to the meeting by the CMI Observer delegate. A copy of that paper, reference number 92FUND/WGR.4/10 and of the questionnaire, may be found at www.iopcfund-docs.org/ds/engframeset.html

It will be seen from that paper that the responses to the questionnaire have taken longer to produce than had been initially expected. It was proposed that a further effort should be made by CMI to obtain as many responses as possible within the coming month (responses from the USA, Australia, New Zealand and the UK have been received since the paper was drafted) and that an academic with knowledge of competition law should be asked to study the collected responses and to produce a report. Dr. Renato Nazzini of the University of Southampton School of Law had been identified as a suitable academic and had indicated willingness to assist.

However the views of the delegates to the Monaco meeting were divided on this subject. A significant number, including Canada, Finland, France, Germany, Italy, and Monaco supporting the CMI proposal, but a slightly larger number, including Algeria, Belgium, Cyprus, Greece, Netherlands, Nigeria, Norway, Panama and UK speaking against the need for further work. The Chairman therefore concluded that there was insufficient support for this proposal. The CMI delegate reminded the meeting that in any event the issue would be included in the programme for the CMI Conference in Athens in October 2008, where the subject would be treated more broadly, and not limited to insurers of ships built for the carriage of oil. He also asked delegates to encourage their National Maritime Law Associations to send in their responses to the questionnaire as soon as possible.

A further suggestion had been put to the working group that it should study the significance of uninsured ships in the context of quality shipping. The Director reported that it had proved extremely difficult to obtain good statistical data on this aspect, and it was finally agreed by the working group that there was little to be gained by pursuing this line of research.

The Report of the Chairman of this working group will be submitted to the meeting of the Fund Assembly scheduled for the week commencing 13th October 2008.

II

The Summer meetings of the Governing Bodies of the IOPC Funds took place at the IMO Building in London from 23 to 27 June 2008. Apart from administrative matters, the meetings reviewed the position in several major claims and final meetings took place of two important Working Groups on Non Technical Measures to promote Quality Shipping and on the implementation of the HNS Convention.

Major Claims

In the *Erika* and *Prestige* matters, steady progress was reported on the settlement of outstanding claims. The French Courts have ruled on several contentious claims, and it was noted that while the Courts have consistently stated that they are not bound by administrative decisions of the Fund Bodies on issues of principle, they have come to the same conclusion by the application of the general principles of French law. In particular the French law on remoteness of damage has produced similar results to the Fund's requirement that there must be a sufficiently close link of causation between the event that led to the damage ("le fait generateur") and the losses suffered.

The *Slops* was a former tanker converted into a waste oil reception facility anchored off Piraeus, which suffered a fire and explosion in 2000. The Greek Government did not consider her to be a "ship" requiring liability insurance, and she had none. The IOPC Fund also concluded that she was not a "ship" within the meaning of the 1992 Fund Convention. The Greek Court of Appeal agreed, but the Supreme Court did not, and condemned the Fund to pay significant sums incurred by clean-up contractors, since the owner was insolvent. It was agreed by the Executive Committee that steps should be taken to investigate the possibility of a recourse action against the Greek Government for failure to ensure that the *Slops* had liability insurance. *Ignorantia juris non excusat*. This principle applies equally to governments. It was however evident from the discussions that many delegates (all representing governments) had little appetite for such an action.

The pollution claims arising from the sinking of the Russian tanker *Volgoneft 139* were again discussed. Claims for pollution damage in Russian territory have been made against the Fund in the Arbitration Court of Saint Petersburg and Leningrad Region, but there are many matters

which remain unclear at this stage. Unfortunately the Fund was not invited to send observers and advisers to assist with the clean up operations, despite an offer by the Fund to do so, and this will inevitably render it more difficult (and slower) to agree the amount of any claims. There is also a question mark over amount of the liability insurance carried by the *Volgoneft 139*, which appears to be significantly less than that required by the 1992 CLC as amended in November 2003. Also some claims submitted appear to be based on "methodika" calculations which do not fall within the definition of "pollution damage" in Article I.6 of the 1992 Fund Convention. The Russian Delegate to the IOPC Fund assured the meeting that all relevant matters were being studied and that a legal analysis will be given at a later date.

When the tanker *Hebei Sprit* was struck by the floating crane *Samsung No1* as she lay at anchor off the west coast of Korea in December 2007, about 10,900 tonnes of crude oil was spilled. The clean-up operation was impressive but expensive, and in March 2008 the total claims were already estimated to exceed the total available under the CLC and Fund Conventions (203 million SDR). Korea is not a party to the Supplementary Fund Protocol. At the March meeting it was agreed that in the circumstances the payments made to claimants should be limited to 60% of approved claims.

Since then the expected level of claims has increased significantly. The total is of course still uncertain but, despite the agreement of the Korean Government to "stand last in the queue", the Director was obliged to recommend to the June meeting that level of payments should be reduced to 40-50%. A lengthy debate took place during which several delegations considered that a more prudent approach should be adopted to avoid the consequences of an overpayment. At the conclusion of this discussion it was decided that the level of payments should be fixed, for the time being at least, at 35%.

Non-Technical Measures to Promote Quality Shipping

The Working Group chaired by Birgit Solling Olsen of Denmark completed its discussions of this subject. She will present a detailed report to the October meeting of the IOPC Fund Assembly, a draft of which can be found in document 92FUND/WGR.4/14 on the IOPC Fund website. The CMI has taken an active part in this work, in close collaboration with the International Union of Marine Insurance (IUMI), particularly in

researching possible means of removing legal obstacles to the sharing of information by insurers. However at the March meeting it was decided that further research by CMI was unlikely to produce a significant contribution to its resolution by the IOPC Fund.

At the June meeting the CMI Observer Delegate informed the meeting that, while CMI accepted the Fund's decision, the CMI proposed to continue work on this topic on the grounds that harmonisation of the legal rules applicable to sharing of such information would give effect to one of the principal recommendations of the OECD Report prepared by Mr Terence Coghlin. CMI has this subject on the agenda of its next conference in Athens in October 2008.

At the end of the meeting the Chairman recommended that the work of the group should be concluded and should not be extended, and this was adopted by the meeting.

The HNS Focus Group

This group was set up in October 2007 to consider proposals to resolve the three issues which had been identified as inhibiting ratification of the 1996 Convention on compensation for Pollution by Hazardous and Noxious Substances (HNS). These are:

- a. the concept of "receiver"
- b. contributions to the LNG account;
- c. the non-submission of contributing cargo reports.

Under the wise chairmanship of Alfred Popp QC of Canada a draft protocol to the HNS Convention has been developed to address each of these issues. The draft text of a protocol to amend the HNS Convention was presented to the March meeting in Monaco. There is a broad consensus among states and industry that the HNS Convention has a useful role to play and that early entry into force is desirable, but without action on these three issues it seems unlikely that this will ever take place.

The original text of the HNS Convention provides

for a separate account for LNG based on contributions by the "title holder" immediately prior to discharge. This is an exception to the general principle (as with oil) that contributions should be made by the receiver of cargo. The most radical proposal in the draft protocol is to align LNG with oil and make the receiver pay. A keen debate took place at the June meeting between gas-importing states who wished to maintain the liability of the 'titleholder', and states which are exporters of LNG, who wished to bring the LNG account into line with the definition of 'receiver' for other HNS cargoes. Papers were presented by Singapore, a joint submission by Japan, Korea and Italy, and an industry paper from the International Group of Liquefied Natural Gas Importers (GIIGNL). These papers propose similar compromise solutions whereby the titleholder would be the primary party liable for contributions with the fall back of the receiver where it was impossible to collect from the titleholder. Whilst the majority of states supported the receiver of LNG as the contributor, there was still support for the importing country's position. An informal correspondence group has been set up, led by Malaysia, to attempt to bridge the gap between the differing viewpoints prior to the October meetings. An unusual feature of these discussions is that HNS is not strictly the concern of the IOPC Fund, which deals with compensation of pollution by oil. However the similarity between the two conventions and the fact that the IOPC Fund Secretariat has already been tasked with administering the HNS Fund means that the delegates attending IOPC Fund meetings are well informed of the potential problems and are better able to develop practical solutions. The revised draft Protocol will be submitted by the Fund Secretariat to the IMO with a request that it be referred to the Legal Committee in October, with a view to convening an early Diplomatic Conference for its adoption.

The next meetings of the IOPC Fund bodies will take place in London during the week commencing 13th October 2008.

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